THE OWNERS OR OTHER PERSONS INTERESTED IN THE SHIP OR VESSEL THE 'RED GOLD'

v.

SARAWAK SHELL BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
SYED AHMAD HELMY JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEALS NO: W-02(IM)-2796-2010
& W-02-2795-2010]
19 MARCH 2012

SHIPPING AND NAVIGATION: *Merchant shipping - Collision - Liability - Owner's claim to limit liability - Vessel's collision with offshore platform caused by dislodged voltage power card controlling pitching of vessel's bow thrusters - Whether damage caused by owner's actual fault or privity - Whether owners failed to supervise proper maintenance of bow thrusters unit - Whether system in place satisfied what was expected of the ordinary reasonable shipowner - Whether standard of maintenance and supervision followed by owners consistent with practices prevailing in industry - Whether owners could limit liability for damage caused under s. 360 Merchant Shipping Ordinance 1952*

A shipping vessel known as 'Red Gold' ('vessel'), owned by South Sumatra Richfield Marine Pte Ltd ('the owners') and managed and operated by Pacific Richfield Marine (S) Pte Ltd ('PRM'), was involved in a collision with an offshore oil platform owned by Sarawak Shell Berhad ('Sarawak Shell'). For the period in question, it was on charter to Petrokapal Sdn Bhd ('Petrokapal') who had entered into the spot charter with Sarawak Shell. During the period of charter hire, the vessel was sent off hire for repairs to the main engine shaft and bow thrusters unit undertaken at Sabah Shipyard in Labuan. Subsequently, when the collision occurred, it was discovered that it was caused by a voltage power card MUP 21 ('power card') that controlled the pitching of the vessel's bow thrusters which had come out of its slot. Arising from this incident and the damage to the platform, Sarawak Shell commenced an *in rem* action ("the collision action".) The owners, PRM and Petrokapal, in turn, commenced an *in personam* action

against Sarawak Shell and its related company for withholding charter hire due to them ('the hire action'). In the hire action, the owners, PRM and Petrokapal maintained that outstanding hire was wrongfully detained by Sarawak Shell and accordingly the sum of USD186,990.26 was due to them. The two suits were heard together. The High Court rejected the owners' claim to limit their liability pursuant to s. 360 of the Merchant Shipping Ordinance 1952 and held that the owners were vicariously negligent for causing the collision because (a) the owners were at fault in not ensuring that the electrical system of the bow thrusters was properly maintained; (b) the accident could have been avoided by a routine inspection of the placement of the power card; (c) the absence of any procedure to ensure the secure placement of the power card constituted a *lacuna* in the manual promulgated and practiced by the owners; (d) the maintenance and inspection of the power card was necessary. In the hire action, the trial judge granted judgment in favour of the appellant against Sarawak Shell Berhad for the balance of the hire due to it. The owners and Sarawak Shell appealed to this court against the High Court's decision in both the *in rem* action and the hire action. The issues that arose herein were (i) whether the collision was caused by the negligence of the owners, in the navigation or management of the vessel; (ii) whether Sarawak Shell contributed to the collision and (iii) whether the owners were entitled to limit their liability under the Merchant Shipping Ordinance 1952 due to the absence of actual fault or privity on the part of the owners.

Held (allowing appeal by owners in the collision action in part; dismissing the appeal of Sarawak Shell in the hire action)

Per Anantham Kasinather JCA delivering the judgment of the court:

(1) The trial judge was correct in finding the owners of the vessel liable in negligence once it was satisfied that the owner's failure to identify the cause of the collision meant that the owner had failed to displace the presumption. Accordingly, the appellant's claim that the respondents negligence contributed to the collision was dismissed. (paras 10 & 11)

(2) In finding that the owners have failed to supervise the proper maintenance of the bow thrusters unit, the trial judge had disregarded the strictures of Lord Brandon in *The Marion* that

when it came to supervision, the court must have regard to the prevailing practice among reputable shipowners. Where the evidence of such practices is all one way, as was the case here, then the court should proceed to accept the evidence of the owners as decisive of good practice. (paras 22, 23 & 24)

(3) Research does not disclose the existence of any authority imposing upon an owner an obligation to be innovative by introducing improvements to existing systems governing these matters. The trial judge disregarded the evidence of both parties to the litigation that the dislodgment of the card had never happened before and was not likely to happen again. The system presently in place satisfied what was expected of the ordinary reasonable shipowner. (para 25)

(4) In rejecting the owners' claim to limit liability, the trial judge had wrongly interpreted the burden on the owners as amounting to one whereby the appellant was required to satisfy the court that the management system in the Red Gold had to be at a level whereby no similar incident would take place again before the owners could be said to have discharged their burden. Further, the trial judge failed to appreciate that the standard of maintenance and supervision followed by the appellants in the management of the Red Gold was consistent with the practices prevailing in the industry at the material time. (paras 37 & 38)

(5) On the issue of causation, the trial judge failed to appreciate that the owners had discharged this burden since the earlier defect in the bow thruster unit had been rectified. Accordingly, this could not have been the cause for the collision. There was no justification for the trial judge to hold the appellant owner to be personally responsible for the collision when the owner had both promptly and effectively dealt with the problems encountered by the vessel in its bow thrusters unit and the earlier dislodgment of MUP 21 card by causing the Red Gold to be sent for repairs by competent specialists. (para 41)

(6) The trial judge's misapprehension of the nature and extent of the burden which the owners had to discharge in itself justified appellate intervention on the facts of this case (*Gan Yook Chin & Anor v Lee Ing Chin)*. Thus, the appellant owner was granted a decree limiting their liability according to the formula stipulated in s. 360 of the Merchant Shipping Ordinance 1952. (para 44)

(7) After a careful examination of the reasons advanced by the trial judge in allowing the claim of the owners for the hire charges but dismissing their remaining claims, this court was unanimous in its view that the trial judge was correct in law in the manner in which she dealt with the claims of the owner in the hire action. (para 47)

Bahasa Malaysia *Translation Of Headnotes*

Kapal laut yang dikenali sebagai 'Red Gold' ('kapal laut'), yang dimiliki South Sumatra Richfield Marine Pte Ltd ('pemilik') dan diurus serta dikendalikan oleh Pacific Richfield Marine (S) Pte Ltd ('PRM'), terlibat dalam satu perlanggaran dengan platform minyak luar pesisir yang dimiliki Sarawak Shell Berhad ('Sarawak Shell'). Bagi tempoh waktu yang dipersoalkan itu, kapal laut tersebut dicarter kepada Petrokapal Sdn Bhd ('Petrokapal') yang telah memasuki carter spot dengan Sarawak Shell. Semasa tempoh sewa carter itu, kapal laut dihantar ke Sabah Shipyard di Labuan untuk aci utama enjin dan unit radakan busur diperbaiki. Kemudiannya, selepas perlanggaran berlaku, didapati bahawa ia adalah akibat kad kuasa voltan MUP 21 ('kad kuasa') yang mengawal penganggulan radakan busur kapal laut itu telah terkeluar daripada ruangnya. Berbangkit dari kejadian ini dan kerosakan pada platform, Sarawak Shell memulakan tindakan *in rem* ('tindakan pelanggaran'). Pemilik, PRM dan Petrokapal pula memulakan tindakan *in personam* terhadap Sarawak Shell dan syarikat berkaitan kerana memegang bayaran sewaan carter yang perlu dibayar kepada mereka ('tindakan sewaan'). Dalam tindakan sewaan, pemilik, PRM dan Petrokapal sebagai plaintif mendakwa bahawa terdapat sewa tertunggak telah ditahan secara salah oleh Sarawak Shell dan oleh itu amaun USD 186,990.26 perlu dibayar kepada mereka. Kedua-dua guaman itu didengar bersama oleh Mahkamah Tinggi yang telah menolak tuntutan pemilik untuk menghadkan liabiliti mereka di bawah s. 360 Ordinan Perkapalan Saudagar 1952 dan

memutuskan bahawa pemilik cuai secara vikarius dalam menyebabkan perlanggaran tersebut sebab (a) pemilik bersalah kerana tidak memastikan sistem elektrik radakan busur diselenggarakan dengan baik; (b) perlanggaran tersebut boleh dielakkan jika pemeriksaan rutin penempatan kad kuasa itu diadakan; (c) ketiadaan apa-apa prosedur memastikan penempatan kad kuasa selamat merupakan satu *lacuna* di dalam manual yang dimasyurkan dan diamalkan oleh pemilik; (d) penyelenggaraan dan pemeriksaan kad kuasa diperlukan. Di dalam tindakan sewaan, hakim bicara telah memberikan penghakiman kepada pihak perayu terhadap Sarawak Shell Berhad untuk baki sewaan yang perlu dibayar kepadanya. Pemilik dan Sarawak Shell merayu ke mahkamah ini terhadap keputusan Mahkamah Tinggi di dalam tindakan *in rem* dan tindakan sewaan. Isu-isu yang timbul di sini adalah (i) sama ada perlanggaran disebabkan kecuaian pemilik, dalam navigasi dan pengurusan kapal laut tersebut; (ii) sama ada Sarawak Shell menyumbang kepada perlanggaran dan (iii) sama ada pemilik berhak menghadkan liabiliti di bawah Ordinan Perkapalan Saudagar 1952 disebabkan ketiadaan kesalahan sebenar atau priviti dari pihak pemilik.

Diputuskan (membenarkan sebahagian rayuan pemilik di dalam tindakan perlanggaran; menolak rayuan Sarawak Shell di dalam tindakan sewaan)

Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara betul dalam penemuannya bahawa pemilik kapal laut bertanggungjawab dalam kecuaian apabila ia dibuktikan bahawa kegagalan pemilik untuk mengenalpasti sebab perlanggaran menunjukkan pemilik tidak berjaya mengenepikan anggapan. Oleh itu, tuntutan perayu bahawa kecuaian responden-responden telah menyumbang kepada perlanggaran tersebut ditolak.

(2) Dalam mendapati pemilik gagal menyeliakan penyelenggaraan unit radakan busur dengan betul, hakim bicara telah mengabaikan sekatan-sekatan Lord Brandon di dalam *The Marion* bahawa apabila ia menyentuh penyeliaan, mahkamah mesti memberi perhatian kepada amalan lazim di kalangan pemilik kapal terkemuka. Di mana keterangan amalan itu adalah satu arah sahaja, seperti di dalam kes ini, mahkamah harus menerima keterangan pemilik sebagai amalan tegas dan baik.

A **(3)** Tiada kewujudan otoriti yang mengenakan ke atas pemilik kewajipan untuk menjadi inovatif dengan memperkenalkan penambahbaikan kepada sistem yang sedia ada yang mengawal perkara-perkara ini. Hakim bicara telah tidak mengambilkira keterangan kedua-dua pihak bahawa perkara kad terkeluar dari
B tempatnya itu tidak pernah berlaku dan tidak mungkin akan berlaku lagi. Sistem semasa yang ada sekarang adalah apa yang harus digunakan oleh pemilik kapal yang biasa dan munasabah.

(4) Dalam menolak tuntutan menghadkan liabiliti pemilik, hakim
C bicara telah salahtafsir beban atas pemilik di mana pemilik perlu membuktikan kepada mahkamah bahawa sistem pengurusan Red Gold harus berada di peringkat di mana tiada kejadian yang sama akan berlaku lagi sebelum pemilik boleh dilepaskan dari beban mereka. Juga, hakim bicara gagal
D menghargai standard dan penyelenggaraan penyeliaan yang diikuti oleh perayu-perayu di dalam pengurusan Red Gold adalah konsisten dengan amalan-amalan yang lazim di dalam industri pada masa material.

E **(5)** Mengenai isu penyebab, hakim bicara gagal menghargai bahawa pemilik telah melepaskan beban sejak kecacatan awal unit radakan busur telahpun diperbetulkan. Oleh itu, ini bukanlah penyebab perlanggaran tersebut. Tiada justifikasi untuk hakim bicara memutuskan perayu pemilik bertanggungjawab sendiri bagi
F perlanggaran apabila pemilik telah dengan segera dan berkesan menangani masalah-masalah yang dihadapi oleh unit radakan busur kapal laut serta kad MUP 21 yang terkeluar sebelum ini menyebabkan Red Gold dihantar untuk pembaikan oleh pakar-pakar berwibawa.

G **(6)** Salah faham hakim bicara berhubungan jenis dan takat beban yang pemilik terpaksa melepaskan dengan sendirinya menjustifikasikan campur tangan rayuan pada fakta kes ini *(Gan Yook Chin & Anor v. Lee Ing Chin)*. Oleh itu, perayu pemilik diberi dekri menghadkan liabiliti mengikut formula yang
H ditetapkan di dalam s. 360 Ordinan Perkapalan Saudagar 1952.

(7) Selepas pemeriksaan teliti alasan-alasan yang dikemukakan oleh yang arif hakim dalam membenarkan tuntutan pemilik untuk caj-caj sewa tetapi menolak tuntutan baki mereka, mahkamah
I ini sebulat suara mendapati bahawa hakim bicara betul dari segi undang-undang berhubungan cara beliau menangani tuntutan-tuntutan pemilik di dalam tindakan sewaan.

Case(s) referred to:
Eurysthenes [1976] 2 Lloyd's Rep 171 ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
Merchant Prince [1892] P 179 ***(refd)***
Moore v. R Fox and Sons [1956] QBD 596 ***(refd)***
Rederji v. The England (Owners) [1973] 1 Lloyds ***(refd)***
Saeng-Un Udom v. Public Prosecutor [2001] 3 SLR 1 ***(refd)***
Simmons v. Pennington & Son [1955] 1 All ER 240 ***(refd)***
Standard Oil Co of New York v. Clan Line Steamers Ltd [1924] AC 100 ***(refd)***
The Lady Gwendolen [1965] 3 WLR 91 ***(refd)***
The Marion [1984] AC 563 ***(refd)***
The Norman [1960] 1 Lloyd's Rep ***(refd)***
The Spider [1932] 43 LLR 217 ***(refd)***

Legislation referred to:
Merchant Shipping Ordinance 1952, s. 360

(Civil Appeal No: W-02(IM)2796-2010)
For the appellant - Sitpah Selvaratnam (Rahayu Mumazaini with her); M/s Tommy Thomas
For the respondent - Liew Teck Huat (Lim Qi Si with him); M/s TH Liew & Partners

(Civil Appeal No: W-02-2795-2010)
For the appellant - Liew Teck Huat (Lim Qi Si with him); M/s TH Liew & Partners
For the respondent - Sitpah Selvaratnam (Rahayu Mumazaini with her); M/s Tommy Thomas

[Appeal from High Court, Kuala Lumpur; Admiralty Action In Rem No: D2-27-28-2005]

Reported by Suhainah Wahiduddin

JUDGMENT

Anantham Kasinather JCA:

Background Facts

[1] On 4 February 2002, a vessel known as 'Red Gold' ('vessel') was involved in a collision with an offshore oil platform owned by Sarawak Shell Berhad ('Sarawak Shell'). The vessel was chartered for a term of seven and a half months from 15 July 2001 pursuant to a spot charter. It was owned by South Sumatra Richfield

Marine Pte Ltd ('the owners') and managed and operated by Pacific Richfield Marine (S) Pte Ltd ('PRM'). For the period in question it was on charter to Petrokapal Sdn Bhd ('Petrokapal') who had entered into the aforesaid spot charter with Sarawak Shell.

[2] During the period of the charter hire, on 17 January 2002, the vessel was sent off hire for repairs to the main engine shaft and bow thruster unit which was undertaken at Sabah Shipyard in Labuan. The bow thruster unit was overhauled and repaired by specialists in this field, namely Rolls-Royce. The repairs to the vessel were completed on 2 February 2002 and the vessel then resumed the charter at 11am on the same day. It carried out a supply run to a number of offshore installations and a number of other locations. On the morning of 4 February 2002 the vessel attended at the West Pelaut Platform and departed from there bound for the D-35 Platform Complex at 9.10am. It arrived on location at D35 at 3pm. It then commenced discharging cargo by the snatch lift method on the southern side of the platform located on the right most tip of the 'L' shape, ie, Platform D35 PG-A. After transferring five lifts, the vessel was instructed to proceed to D35-QA, the subject platform to discharge the remainder of the cargo in the same manner.

[3] The discharge of cargo at D35-QA platform by the snatch lift method commenced at 4.20pm. At 4.25pm the vessel drifted in a southerly direction resulting in the starboard closing in on the platform. The Master was unable to correct this drift as there was a problem with the pitching control of the bow thruster that was stuck at 30 degrees to the starboard. As attempts to push the bow thruster emergency cut off button to turn of the bow thruster engine was not successful, the vessel's general alarm was activated to warn of imminent contact between the vessel and the platform. Notwithstanding these efforts the vessel's wheelhouse collided with the north west corner of the platform at 4.30pm. The Master was only able to steer the vessel away at about 4.40pm. The Chief Engineer Suyarman ('DW3') testified that when he opened the sealed box containing the power card which controlled the movement of the vessel, he discovered that the power card in respect of the pitching of the bow thruster was out of its slot. DW3 also testified that the bow thruster pitching problem ceased immediately after he inserted the card back into its slot.

[4] Arising from this incident and the damage to platform number D35 QA, Sarawak Shell commenced an *in rem* action D2-27-28-2005 which the learned trial judge described as 'the collision action'. The owners, PRM and Petrokapal, in turn, commenced an *in personam* action against Sarawak Shell and its related company for withholding charter hire due to them (the hire action). In the hire action the owners, PRM and Petrokapal as the plaintiffs maintained that outstanding hire was wrongfully detained by Sarawak Shell and accordingly the sum of USD 186,990.26 together with interest is due to them. Further the owners and PRM claim in tort against Sarawak Shell for inducing a breach of Petrokapal's contract with the former, or for wrongful interference with such contract, causing loss. The two suits were heard together and the judgment of learned trial judge is a judgment in respect of both suits.

Issues In The *In Rem* Suit

[5] The judgment of the learned trial judge dealt with some five issues in the *in rem* suit. However, we propose to only deal with the following issues. The first issue is whether the collision was caused by the negligence of the owners, in the navigation or management of the vessel (first issue). The second issue is whether Sarawak Shell contributed to the collision (second issue). The third issue is whether the owners are entitled to limit their liability under the Merchant Shipping Ordinance due to the absence of actual fault or privity on the part of the owners? (third issue). If so, the quantum of the limitation amount? (fourth issue)

First Issue

[6] Although Sarawak Shell cited some nine instances of alleged negligence in relation to both navigation as well as the management of the vessel, the learned trial judge summarized the plea of negligence against the owners as consisting of:

(a) Negligent navigation arising from vicarious liability for the acts or omissions of the Master in the navigation of the vessel;

(b) Negligent management of the vessel by the owners; and

(c) Breach of duty on the part of the owners.

[7] On the plea of negligence, in our judgment, the learned trial judge correctly ruled in the first instance that Sarawak Shell had discharged the initial burden of proof vested on it based on the principles set out in the *Merchant Prince* [1892] P 179 and the case of *Moore v. R Fox and Sons* [1956] QBD 596. We agree with the learned trial judge that the principle of *res ipsa loquitur* is relevant and applicable on the facts of the instant case, given that the collision was occasioned in broad daylight between the vessel and a stationary object.

[8] As opined by the learned trial judge, the onus then shifted to the owners to rebut the charge of negligence by showing that the cause of the collision was a cause not produced by them. Evershed MR in the same case of *Moore v. R Fox and Sons* described the extent of this burden on the owner by quoting Asquith LJ in *Barkway v. South Wales Transport Co*:

> (i) If the Defendants omnibus leaves the road and falls down an embankment, and this without more is proved, then *Res ipsa loquitur* there is a presumption that the event is caused by negligence on the part of the Defendants, and the Plaintiff succeeds unless the Defendants can rebut this presumption.
>
> (ii) It is no rebuttal for the Defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst *per se* is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the Defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down ...
>
> (iii) To displace the presumption, the Defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (b) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres; *Wood v. Duncan* (The Thetis).
> (at p. 611)

[9] It is common ground and the finding of the learned trial judge that the proximate or effective cause of the collision was the dislodgement of the power card MUP 21 from its sitting. This card facilitates the supply of voltage to the system. It was

also the learned trial judge's finding that no clear explanation or reason had been put forward for such dislodgement by the owners. The learned trial judge at p. 164 of AR Jilid 1 whilst accepting the evidence tendered on behalf of the owners that the dislodgement was probably due to vibration nevertheless concluded:

(a) It cannot definitively pinpoint the reason for the dislodgement of the power card on 4 February 2002;

(b) It is possible that such dislodgement was caused by the vibration of the vessel.
(see p. 165 AR – Jilid 1)

[10] In our judgment, applying Asquith LJ's formulation set out above, the trial judge was not wrong to find the owners of the vessel liable in negligence once Her Ladyship was satisfied that the owner's failure to identify the cause of the collision meant that the owner had failed to displace the presumption. Accordingly, whilst we are unable to agree with some of the findings of fact of the learned trial judge when dismissing the owners claim to have exercised reasonable care, for reasons which will appear later in this judgment, we are not persuaded that the errors committed by the learned trial judge warrant appellate intervention.

Second Issue

[11] We are in agreement with the reasons advanced by the learned trial judge in dismissing the appellant's claim that the respondent's negligence contributed to the collision. For this reason, we dismiss the appellant's claim based on contributory negligence.

Third Issue

[12] Section 360 of the Merchant Shipping Ordinance 1952 provides *inter alia* that where a ship has, in the discharge of its cargo, caused damage to any property, the owner of the ship is entitled to limit his liability for such damage to an amount based on the tonnage of his ship and calculated in accordance with the formula provided in the section as long as such loss or damage was sustained "without its actual fault or privity". In order for a shipowner to limit his liability provided by s. 360, he has the onus of proving that the loss or damage caused by the negligent navigation or management of his ship took place without his

A "actual fault or privity". As much turns on the burden of proof vested on the owners, we propose in this judgment to examine the nature and extent of this burden: whether the judge correctly applied the appropriate legal burden to the facts of this case bearing in mind that part of this burden was to satisfy the court
B that the fault if any on the part of the owners did not cause or contribute to the collision.

Law On Burden Of Proof – Limitation Actions

C **[13]** In our judgment, a suitable case to commence this examination is the case of *Standard Oil Co of New York v. Clan Line Steamers Ltd* [1924] AC 100. In this case the House of Lords was required to pronounce on whether the owners can claim to have discharged their burden by appointing an engineer to notify
D the master of the vessel of a peculiar defect in the vessel but which he omitted to do. Viscount Haldane in holding the owners to be personally liable for the default of the engineer provided the following grounds for this finding:

> Now, even on the assumption that the late Mr. Lyall was fully
E directed to instruct the master on this point, and that the failure to do so was his fault, the owners are surely not discharged from responsibility. For their personal duty was to provide a seaworthy ship, and the ship was not seaworthy if the master was not instructed on the special matter in question

F In our judgment, the case of *Standard Oil Co of New York v. Clan Line Steamers Ltd* is authority for the proposition that the owners are not absolved of actual fault merely by appointing a competent person to attend to a defect in the vessel known to them which had caused or contributed to the events giving rise to the
G plaintiff's claim. To discharge the burden vested on them, the owners must also ensure that the person appointed by them discharged his duties.

[14] In the more recent case of *The Lady Gwendolen* [1965] 3
H WLR 91 the English Court of Appeal was required to pronounce on whether the owners were at actual fault for their master's frequent navigation of their vessel at excessive speeds in fog arising from the failure of the Marine Superintendant appointed by the owner to detect this conduct on the part of the master.
I The court accepted that but for the introduction of radar the owners would not be liable. Willmer LJ when discussing the

nature and extent of the burden on the owner said that a court seeking to find the shipowner personally liable should examine in detail the facts of each case to determine "what in fact the shipowner did, or omitted to do, which could fairly be said to constitute actual fault on their part". His Lordship further opined that the test was an objective test. Willmer LJ then proceeded to adopt the reasons advanced by Justice Hewson in the court below for holding the owner personally liable. The reasons being:

> In my view, the radar problem was one of such serious import as to merit the personal attention of what I will call the owners. It was the duty of Mr. D.O. Williams and his predecessor, as well as those under them, so to do. I think that I have said enough. The proper function and the proper use of radar is fog were never considered by Williams or anyone else, and no steps were taken to impress these upon Captain Meredith. After weighing up this case and the evidence and the circumstances with what I hope is all the care of which I am capable, I am driven to the conclusion that a total lack of sense of the urgency of the problem posed by radar navigation in fog in Captain Meredith was a contributory cause of this collision and this sense of urgency and importance should have been instilled in him from the highest level.

In our judgment this case is authority for the proposition that the owners of vessels must keep abreast of any new development relating to improvements in the operation, navigation and management of their vessels and ensure that such new developments are communicated promptly and in an appropriate manner, ie, by qualified personnel, to their servants agents who manage their vessels. The rationale for this proposition is because in the words of Willmer LJ:

> It seems to me that any company which embarks on the business of shipowning must accept the obligation to ensure efficient management of its ships if it is to enjoy the very considerable benefits conferred by the statutory right to limitation.
> (per Willmer LJ at pg 108)

[15] The English Court of Appeal in the subsequent case of *Rederji v. The England (Owners)* [1973] 1 Lloyds ruled that efficient management included the obligation on the part of the owner to supply navigational information and publications to the master of the vessel. Sir Gordon Willmer referred to the decisions of *The Lady Gwendolen* and *The Norman* [1960] 1 Lloyds Rep as signaling

A "this relatively new approach" as regards the duty of owners. This new approach was accepted by the House of Lords in the *The Marion* [1984] AC 563 as:

> The correct approach in law to the problem of actual fault of
B shipowners or ship managers in contested limitation actions
(per Lord Brandon at p. 573).

[16] Lord Brandon described this new duty in the context of navigational information as consisting of:

C > it was not, and could not sensibly, have been disputed that, in order to ensure the safe navigation of a ship on the voyages undertaken by her, three requirements with regard to charts have to be fulfilled. The first requirements is that she should have on board, and available for use, the current versions of the charts necessary for such voyages. The second requirement is that any
D obsolete or superseded charts, which might formerly have been proper for use on such voyages, should either be destroyed, or, if not destroyed, at least segregated from the current charts in such a way as to avoid any possibility of confusion between them. The third requirement is that the current charts should
E either be kept corrected up to date at all times, or at least that such corrections should be made prior to their possible use on any particular voyage.
(see p. 573)

Lord Brandon not surprisingly therefore in *The Marion* held the
F owners personally liable for the damage caused when the anchor of the vessel fouled an oil pipeline when the vessel was being navigated with an obsolete chart.

[17] In the context of a vessel which suffers from a defect
G rendering it to be unseaworthy, it is generally accepted that an owner is only disentitled from limiting his liability if the owner with knowledge of the facts constituting the unseaworthiness, nevertheless does little or nothing to rectify the defect. Lord Denning MR in the *Eurysthenes* [1976] 2 Lloyd's Rep 171
H put it this way:

> To disentitles the shipowner, he must, I think have knowledge, not only of the facts constituting the unseaworthiness, but also knowledge that those facts rendered the ship unseaworthy, that is not reasonably fit to encounter the ordinary perils of the sea.

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> And, when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase 'turning a blind eye'. If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry so that he should not know if for certain then he is to be regarded as knowing the truth. This 'turning a blind eye' is far more blameworthy than mere negligence. Negligence is not knowing the truth is not equivalent to knowledge of it.

[18] The obligation of the owners, however, does not cease with the supply of the latest charts. The duty of the owner extends to supervising the master to ensure that he uses the charts to promote the safe navigation of the vessel. According to Lord Brandon when considering the culpability of the owner for lack of supervision, *"the practices of other reputable shipowners at or about the same time is clearly relevant, although, unless the evidence of such practices is all one way, or nearly all one way, it cannot be decisive"*. We understand Lord Brandon's pronouncements as imposing an absolute obligation on the part of the owner to equip their vessel with the latest available equipment beneficial to safe navigation (emphasis added) but the obligation to supervise the use of such equipment by the master according to the standards followed by other reputable shipowners.

[19] The extent of the burden of proof vested on the owner is spelt out in the judgment of LJ Sellers in *The Lady Gwendelon*. His Lordship described this burden as:

> In their capacity as shipowners they must be judged by the standard of conduct of the ordinary reasonable shipowner in the management and control of a vessel or of a fleet of vessels.

Findings Of The Learned Trial Judge

[20] The learned trial judge rejected the appellants' claim to limit their liability pursuant to s. 360 on the following grounds:

(a) There was no provision in the ISM manual for any checking of the electrical system of the bow thruster unit. To the extent that the electrical component of the bow thruster unit formed an integral and essential part of bow thruster, the learned trial judge concluded that the owners were at fault in not ensuring that the electrical system of the bow thruster unit was properly maintained. The learned trial judge opined that

A the absence of any procedure to ensure the secure placement of the MUP 21 constitutes "a lacuna in the ISM manual promulgated and practice by the owners"
(Ground A – see pp. 190 and 192 AR Jilid 1)

B (b) That following the repairs undertaken to the vessel in late January 2002, the replacement MUP 21 card was not secured sufficiently resulting in the card, being displaced, probably due to vibration
(Ground B – see p. 191 AR Jilid 1)

C (c) The learned trial judge rejected the evidence of DW1 and DW2 that no maintenance or inspection of the MUP 21 card is necessary save when there is evidence of malfunction. Her Ladyship's rejection of their evidence was because "there is no remedy or precaution afforded by either of these two D witnesses to prevent or avoid such an incident from recurring'. There is also no response suggested or advice in relation to the response to be undertaken in the event of such an emergency on the part of the crew
(Ground C – see p. 191 AR Jilid 1).

E (d) Finally, the fact that the Chief Engineer was able to discover the flaw, ie, the dislodgement of the MUP 21 card and rectify this flaw expeditiously after the incident by reinserting the card, according to the learned trial judge, demonstrated that F the accident could have been avoided by a routine inspection of the placement of this power card, along with others'.
(Ground D – see p. 192 AR Jilid 1)

Examination Of The Learned Trial Judge's Findings

G **[21]** We now propose to examine each of the learned trial judge's findings forming the basis of Her Ladyship's decision disentitling the owners' claim for limitation.

Ground A

H **[22]** With respect, we are unable to agree with the learned trial judge's finding that the owners failed to properly maintain the electrical component of the bow thruster unit. First, the learned trial judge in coming to this conclusion disregarded the fact that

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the electrical system comprised a series of cards in an electric box which supplied voltage. There is also a card which controls the pitch of the thruster blade's angle, ie, MUP 21 card. In all, there are three cards in the electric box and there is also a series of knobs. Collectively the cards and knobs control the function of the bow thruster unit. If any one of these cards is displaced or not functioning, the unit's function will similarly be impaired. It is therefore reasonable to infer that the functional test conducted for purposes of ISM compliance would have revealed if the displacement of the cards was caused by any defect in the electrical component of the bow thruster unit. This is evident from DW2's answer at p. 381 vol. 6 of AR in the following terms:

> The function test does all that, if the card was displaced, it won't work. It tests all parts, the engine, the thrusters, and the electrical system.

With respect, in our opinion, the learned trial judge was unduly influenced by the answer of DW1 that the electric box containing the cards was not supposed to be subject to regular maintenance by the crew. Her Ladyship failed to appreciate that there was good reason for the crew not being required to maintain the electrical component of the bow thruster unit. That was this. Such maintenance required specialist care as explained by DW1 in his evidence:

> That is an area not their expertise. Should there be a problem, the first thing they need to check is the hydraulics and things that is down below in thruster. Should they suspect there is an elec prob, they may open up to visually look at it or contact us to get an engineer over to carry out that job
> (p. 334 vol. 6, Record of Appeal)
>
> It is recommended to be solely done by trained RR engineers
>
> They are not specially trained to determine which card is at fault. And troubleshooting is normally a job of the trained service centre
> (p. 335, vol. 6, Record of Appeal)
>
> There are numerous things that is considered hardware of system and this card is considered hardware which is locked away and not designed to be routinely check.
> (p. 339 and 340, vol. 6, Record of Appeal)

[23] Secondly, Her Ladyship in finding the owners to have failed to supervise the proper maintenance of the bow thruster unit disregarded the strictures of Lord Brandon in *The Marion* that when it comes to supervision, the court must have regard to the prevailing practice among reputable shipowners. The evidence before the court as regards the practice concerning the checking of the bow thruster unit is to be found in the following answers of the Master Mariner, DW2:

Q44 : You have sailed on may vessels which have done off-shore work. Would the bow thrusters be tested before entering the platform:

A : Yes, Prior to the event of the ISM it is normal practice to operate everything prior to entering the 500 meter zone. The bow thrusters and propulsion is critical. I don't know whether any vessel I have been on where that equipment was not tested before commencing any critical activity.
(at p. 411, vol. 7, Record of Appeal)

Q31 : From your experience, can you inform whether it is common for electrical problems to arise on a ship:

A : It is common, yes.

Q32 : If it is a common problem, what to you will distinguish a well-run and maintained ship fm a ship that is not well maintained?

A : The well-run vessel ship is one that is operated by an experienced and certificated crew and operated by an owner that implements PMS scheme and ISM which is now statutory quality management scheme and undertakes regular maintenance.

Q33 : How would a well-run ship deal with this common problem of electrical nature:

A : If the nature of the problem falls outside the capabilities of the crew or requires the service of specialist contractors, they would contract the work out and I would expect them, to do so

Q34 : In your opinion as master mariner, had the owners of the Red Gold in this instance attended to the problems relating to the bow thrusters as would any prudent owner operating run-well vessel had done?

A : The information that I had, I don't think there could be more to be done. They brought the expertise in when they had problem and those issues were resolved.
(pp. 408 and 409, vol. 7, Record of Appeal)

[24] The significance of the answers of DW2 was that his answers were not contradicted by any contrary evidence introduced by the respondent. On the contrary the principal witness of Sarawak conceded that the maintenance procedure undertaken by the appellants was adequate as evidenced by the following two answers of PW 1:

Q : In terms of checking, you also agree that there was nothing better the owners could have done than what they did here which was to get specialist Rolls Royce engineer to check the card and slot it the day before the voyage:

A : Agree
(p. 302, vol. 5, Record of Appeal)

Q : I put to you that there was nothing could have been done by the ship owners to avoid the card from coming out of the slot at that point in time before the collision:

A : I agree. At that time, the ship owners are not on board as well.
(p. 311, vol. 5, Record of Appeal)

According to Lord Brandon, where the evidence of such practices is all one way, as was the case here, then, the court should proceed to accept the evidence of the owners as decisive of good practice. With respect, the learned trial judge does not appear to have done this.

[25] Thirdly, according to the authorities, the burden on the owner as regards seaworthiness and safe navigation is limited to ensuring that the latest technology available in the market is made available to the master of the vessel. With respect, our research does not disclose the existence of any authority imposing upon an owner an obligation to be innovative by introducing improvements to existing systems governing these matters. In this regard, the learned trial judge totally disregarded the evidence of both parties to the litigation that as far as they were aware the dislodgement of the card has never happened before and not likely to happen again. In the light of this shared experience of both parties to the

suit, we are unable to concur with the judge's findings that the owner's "insistence that even after the collision no system could be put in place to prevent the recurrence of such an incident" afforded a basis for the court to deny the appellants the right to limit their liability. In this respect, the learned trial judge failed to appreciate that for the manufacturer to retain the present configuration of the bow thruster unit as evidenced by the answer of DW1 that:

> as far as I know there is no system in place to check even today, the control system has been upgraded to a different system.

the system presently in place satisfies what is expected of the ordinary reasonable shipowner, ie, the burden formulated by Sellers LJ.

Ground B

[26] With utmost respect to the learned trial judge, this ground is completely contrary to the evidence before the court. The evidence before the court was that if the bow thruster power card was not properly slotted in, the bow thruster would not function. The undisputed evidence of DW1, the Rolls Royce Specialist at p. 345 AR vol.6 was that:

> if this card is slotted in then the syst will work, if not it wont work. Its either in or out, no possibility of putting it in half way. No chance system will work if half way out

In other words, the evidence of the experts was that on the morning of 4 February 2002, the vessel could not have proceeded to platform D35 PG-A and thereafter to platform D35-QA in the afternoon unless the MUP 21 was properly slotted in. Secondly, there is the evidence of DW2 that bow thruster system is subjected to a function test involving a testing of all cards, the engine, the thrusters and the electrical system thereby discounting the possibility of the MUP 21 not having been properly slotted in before the vessel departed to the platform. Thirdly, this ground for denying the claim of the owners to limit their liability is not even supported by the evidence of the principal witness of Sarawak Shell. For instance, at p. 278 of vol. 5 of the Record of Appeal, PW1 provided the following answers to questions posed by appellant's counsel:

Q24 : And if the bow thruster power card becomes dislodged, the bow thruster would not function, the pitch would be affected:

A : Yes, that is true.

Q25 : So similarly, agree if the bow thruster was functioning properly, pitch controllable, it must mean the power card was properly slotted in? (repeat) conversely, if the bow thruster was functioning properly, pitch controllable, it must mean the power card was slotted properly, working?

A : I believe so, yes.

Q : If the bow thruster is working at the 500m zone, is there any check of the power card needed?

A : At that moment, not required
(see p. 301, vol. 5, Record of Appeal)

Q : The bow thruster was working at 500m zone, subsequently dislodged, Check at 500m zone would not have prevented it from dislodging?

A : In a sense, I agree with you.
(see p. 402, vol. 5, Record of Appeal)

[27] Finally, the learned trial judge's premise for Ground B, ie, that the MUP 21 card was not properly secured, with respect, is in conflict with the learned trial judge's finding in the earlier part of Her Ladyship judgment that:

> Accordingly, on a balance of probability, I accept the Chief Engineer's evidence that the replacement power card MUP 21 was dislodged from its sitting ... it is possible ... that such dislodgement was caused by the vibration of the vessel
> (see pp. 164 and 165 AR Jilid 1).

Ground C

[28] With respect, in our opinion, this ground imposed the burden on the owners beyond that pronounced in the existing authorities. In our judgment, the learned trial judge in dismissing the owner's claim to limit liability on Ground C failed to sufficiently appreciate the fact that the owners had prepared for and implemented on the vessel at the time of the collision an

A International Safety Management Manual ahead of compulsory international requirements. Further, they had provided a comprehensive system of safety management and maintenance of the vessel which complied with international standards. Evidence was also led that they had in place a planned
B maintenance system which provided for a weekly, monthly, three monthly, six monthly and annual maintenance of all the vessel's equipment and machinery. This, it was contended, demonstrated that there was in place a more than adequate system of safety management and maintenance. More specifically with regards to
C the bow thruster, reference was made to the requirement for and implementation of checks on the hydraulic pump in both January and February 2002. The owners further relied on the evidence of DW1, the specialist engineer from Rolls Royce who confirmed that the maintenance system with regards to the bow thruster on the
D vessel was sufficient. When asked whether there should be included a system of inspection of the power cards by the crew, he responded that the commissioning and set up of the bow thruster is conducted by a specially trained engineer from the factory and the crew are not allowed to do further adjustments.

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[29] In fairness to the learned trial judge, it must be acknowledged that Her Ladyship did accept that the vessel was properly classed and otherwise in good condition (see p. 193 AR Jilid 1). However, Her Ladyship was influenced by what she
F described as "clearly insufficient to preclude or avoid an incident such as the displacement of the power card in the bow thruster unit" (see p. 194 AR Jilid 1) as justification to deny the owners the right to limit liability. In other words, in the opinion of Her Ladyship, so long as the risk of the MUP 21 card being dislodged
G due to vibration continued to exist, then, the owners cannot limit their liability.

[30] With respect, in our judgment, the burden on the appellants as owners did not extend to satisfying the court that a similar incident will never happen again. As at 4 February 2002, there is
H no evidence that other shipowners had visual checks of the power cards, or used any other method but the functional testing of the bow thruster as a means of testing its proper working. The functional testing, tests all aspects including the electrical components and power cards at that point of time. As submitted
I by counsel for the appellant, this is the undisputed evidence of the experts.

[31] In this respect, Her Ladyship failed to recognize that based on the undisputed evidence of the experts, the dislodgement of the MUP 21 card had not taken place other than in this one instance in the past. The evidence of DW1 on this aspect of the case was:

A : If there is a cause for concern, like the card falling out before and we know about it then of course corrective action has to be taken. There is no doubt about it.

A : I don't agree on that. I give you my reasons. If there is no history of the card actually falling out, there is no reason to look at it repeatedly. There is several other card, steering gears etc. there is no reason unless there is something to tell you. If there is then of course, corrective action has to be taken. If there is no history, there is no way to check every single card. It is not designed that way.
(pp. 349 and 350, vol. 6, Record of Appeal)

J : You would expect the card which you slotted in you would expect it to be vibration proof

A : Yes there are many other vessels having similar arrangement and there is no particular incident that I am aware of.
(p. 356, vol. 6, Record of Appeal)

Q : We summarise your position. Despite constant vibrations which may result in cards being dislodged, your position is that no preventive measure is necessary to do regular checks on card. Yes or no.

A : This particular cabinet there is no particular requirement to suspect that the card would fall out.

Q : Despite vibration:

A : Because it never happened before you know.
(p. 350, vol.6, Record of Appeal)

Q : Similar thruster which entails regular checking to make sure cards are not dislodged from their seating's?

A : As far as I know there is no system in place to check even today, the control system has been upgraded to a different system.
(p. 352, vol. 6, Record of Appeal)

[32] With respect, in the face of such undisputed expert evidence, we are unable to agree with the learned trial judge that unless the owners already had in place a solution to the dislodgement of the card, that they are vicariously liable and consequently cannot seek to limit their liability. The fact of the matter is that even the principal witness from Sarawak Shell did not make such an assertion. After suggesting that the owners should have incorporated a holding device to prevent the dislodgment of the card, the same witness was unable to expound how this could be achieved when he said at p. 299 vol. 5

> We do not know but when we were asking Petrokapal to look into the matter as a recommendation.

Further down in the next page, the same witness conceded that this was his recommendation after the event and not something which he was contending that the owner ought to have incorporated as part of the safety device expected of a vessel like the vessel.

Ground D

[33] On the issue of whether the collision could have been avoided by the crew undertaking visual examination of the card at periodic intervals, the evidence of the expert DW2 was that such visual examination is undertaken in any event prior to the vessel entering the 500m zone, prior to entering port, prior to departure, effectively prior to use (see p. 380, vol. 6, appeal record). According to the same expert, similarly, the bow thrusters are tested before entering the platform. According to him, it is normal practice to operate everything prior to entering the 500m zone, particularly the bow thruster and the propulsion mechanism (see p. 411, vol. 7, appeal record).

[34] The learned trial judge rejected the evidence of DW2 and instead concluded at p. 92 vol. 2 of the AR that:

> The evidence appears to show that such an incident whereby the power card is dislodge is avoidable by undertaking a visual examination of the card periodically or securing the same so as to preclude dislodgement as the consequent of the vibration.

At p. 94 of the same volume, Her Ladyship further ruled that: A

> In the instance case, it cannot be said that the dislodgment of power card in the electrical box of the bow thruster unit amounted to a flaw which could not be seem or discovered by any known mean. The dislodgment of the power card could quite easily have been detected by a visual inspection of the electrical box. B

[35] With respect, we are unable to agree with this ground of the learned trial judge as a basis to deny the owners the right to limit their liability because the aforesaid findings and conclusion of the learned trial judge are not only contrary to the expert C evidence but also against the evidence of Sarawak Shell's principal witness. PW1 in answer to the question:

> Q : if the bow thruster is working at the 500m zone is there any check of the power card needed? D
>
> A : At that moment, not required

In answer to another question:

> Q : The bow thruster was working at 500m zone, subsequently dislodged, check at 500 zone would not have prevented it from dislodging? E
>
> A : In a sense, I agree with you.

At p. 302 vol. 5, in answer to the question: F

> Q : In terms of checking, you also agree that there was nothing better the owners could have done than what they did which was to get specialist Rolls Royce engineer to check the card and slot it the day before the voyage:
>
> A : Agree G

Further at p. 307, vol. 5, record of appeal, PW1 conceded that DW1 had tested and certified the equipment of the vessel to be in order pursuant to a visual check on 1 February 2002 to an extent whereby he was prepared to accept that the vessel had a H safe management system before the incident (see p. 292, of vol. 5, record of appeal). In the light of the concessions made by Sarawak Shell's principal witness and the undisputed evidence of the experts that visual inspection of all the cards at all times was neither practical nor that it could have prevented the collision, I

A we are unable to accept the learned trial judge's Ground D as a basis to reject the owner's claim to limit their liability under s. 360 of the Merchant Shipping Act.

Decision Of The Court

B **[36]** The House of Lords in *The Marion* recognized that the owner's entitlement to limit its liability posed a mixed question of fact and law to the court. Lord Brandon opined:

> The question whether, where damage had been done by a ship,
C such damage occurred without the actual fault of her owners or managers is primarily one of fact, to be decided by reference to all the circumstances of any particular case. Such a question involves nevertheless an element of law, in that the answer to it must depend, in part at least, on what approach Courts dealing with contested limitation actions adopt, in relation to safety of
D navigation, to the responsibilities of masters on the one hand and shipowners or ship managers on the other.
>
> (see p. 572 of the Reported Judgment of the Court)

E Since the appellant's claim to limit its liability is a mixed question of fact and law, in our opinion, an appellate court need not exercise the customary degree of caution before interfering with the findings of a lower court on matters concerning limitation of liability. Indeed, in *The Marion* itself, the Court of Appeal set aside
F the finding of the High Court that the owners were entitled to regard the provision of charts as the responsibility of the master. Lord Brandon in upholding the leading judgment of Dunn LJ in the Court of Appeal acknowledged that Dunn LJ had correctly concluded that the learned trial judge, Sheen J was wrong to have
G reached that conclusion based on the evidence of the expert witnesses.

[37] In our view, in law, the learned trial judge wrongly interpreted the burden on the owners as amounting to one whereby the appellant was required to satisfy the court that the
H management system in the Red Gold had to be at a level whereby no similar incident would take place again before the owners could be said to have discharged their burden. Indeed, at p. 82 of Her Ladyship's judgment (see p. 209 of Jilid 1), Her Ladyship imputed a burden whereby, according to Her Ladyship, unless the owner
I detected inherent defects in the vessel and ensured the

rectification of the same, the owner can be said to have failed in discharging the burden. In our opinion, apart from this finding of Her Ladyship being, with respect, inconsistent with Her Ladyship's earlier finding for holding the owners liable in negligence, inherent defects are generally regarded as falling within the expertise and responsibility of the manufacturers. This principle of law was followed by the English Court in *The Spider* [1932] 43 LLR 217 when dismissing the claim based on negligence upon a finding of inherent defect. Accordingly, in our judgment, the burden imputed to the owner by Her Ladyship is considerably higher than the one pronounced by Sellers LJ in *The Lady Gwendolen*. This explains Her Ladyship's decision to hold the owner to be in actual fault based on the erroneous premise that the owner was required in law to innovate a system to properly secure the power cards so as to prevent a recurrence of the collision, including detecting inherent defects and having the same rectified.

[38] On the issue of supervision of the maintenance of a vessel by the owners and the degree of responsibility of the owners for any lack of supervision, Lord Brandon in *The Marion* opined that:

> In considering whether this lack of supervision was a fault on Mr. Downard's part, the practices of other reputable shipowners at or about the same time is clearly relevant, although, unless the evidence of such practices is all one way, or nearly all one way, it cannot be decisive.
> (see p. 574)

The learned trial judge in holding the appellants to be at fault for basing their 'maintenance on the recommendation of specialist manufacturer of the equipment' failed to appreciate that the standard of maintenance and supervision followed by the appellants in the management of the Red Gold was consistent with the practices prevailing in the industry at the material time. The unchallenged expert evidence was that the Red Gold possessed a safe management system before the incident. Indeed, Sarawak Shell's principal witness PW1 himself admitted this to be the case at p. 292 vol. 5 and the learned trial judge herself acknowledged that the management system pursued by the appellants was in accordance with international standards. In our judgment, in the face of the unchallenged expert evidence of DW2, a Master Mariner at pp. 408 and 409 vol. 7 that the

maintenance procedure followed by the owners of the Red Gold was in accordance with the prevailing practice of reputable shipowners, it was wrong on the part of the learned trial judge to reject this evidence and substitute Her Ladyship's own opinion. In our respectful view, confronted with this evidence, Her Ladyship should have followed the pronouncements of Lord Brandon in *The Marion* and held the unchallenged evidence of DW2 to be decisive of what represented acceptable practice for the maintenance of a vessel like the 'Red Gold', thereby absolving the owners of any actual fault.

[39] Her Ladyship's opinion about the incorporation of a safety device to prevent the dislodgment of this card based on DW3 being able to restore power by the simple procedure of re-inserting the card amounted to the use of hindsight to determine what the owners ought to have done before the collision. With respect, this is not permitted in law (see *Simmons v. Pennington & Son (affirm)* [1955] 1 All ER 240). Furthermore, in our opinion, it was wrong for the learned trial judge to express this opinion in the absence of expert evidence. As opined by LP Thean JCA (as he then was) in *Saeng-Un Udom v. Public Prosecutor* [2001] 3 SLR 1, a judge should avoid expressing an opinion on a matter which was clearly 'outside the learning of the court'.

[40] On the issue of causation, the House of Lords recognized that the burden vested on the owner included having to prove that:

> If there was any such actual fault, it did not contribute to the damage
> (see p. 571 of the Reported Judgment of Lord Brandon).

In our judgment, the learned trial judge failed to appreciate that the owners had discharged this burden since the earlier defect in the bow thruster unit had been rectified. A fact that was acknowledged by Sarawak Shell's principal witness. Accordingly, this could not have been the cause for the collision. Indeed, the learned trial judge's own finding was that the immediate cause for the collision was the dislodgment of the power card MUP 21 from its sitting and which dislodgment 'was caused by the vibration of the vessel' (see p. 164 and 165 AR Jilid 1).

[41] Finally, in our judgment, there was no justification for the learned trial judge to hold the appellant owner to be personally responsible for the collision when the owner had both promptly and effectively dealt with the problems encountered by the vessel in its bow thruster unit and the earlier dislodgement of MUP 21 card by causing the Red Gold to be sent for repairs by competent specialists. In other words, this is not a case of the appellant owner turning a blind eye, to use the words of Lord Denning MR in the case of *Eurysthenes*. Indeed, this was not the case of the respondents against the appellant.

Submission Of Counsel For The Respondent

[42] It was urged upon us by counsel for the respondent, based on the pronouncements of Justice J Prakash that this court should be slow to grant a decree of limitation pursuant to s. 360 since over the years, the courts have whittled down the protection available to a shipowner under the 1957 convention. In this respect, we were referred to the passage in the judgment of Justice J Prakash where Her Ladyship is quoted to have said that:

> there is hardly a reported case after the Norman when the Owners have managed to show that his systems of the management of the vessel were such that they in no way contributed to any negligence on the part of the crew of the vessel.

[43] With respect, this submission of counsel overlooks the fact that in all the three cases relied upon by the learned trial judge in support of Her Ladyship's decision, there was evidence of inefficient management of the vessel or of some unseaworthiness which the owners failed to address notwithstanding their knowledge of the same. In *The Marion* cited by Her Ladyship at p. 200 of Jilid 1, there was evidence that the master was in the habit of using obsolete maps and that the use of the latest maps would have prevented the accident. As explained earlier in this judgment, the House of Lords in this case ruled that the Court of Appeal was right to have overruled the High Court judge's decision that there was no responsibility on the owners to ensure that the master of the vessel was provided with the latest maps and chart. Similarly, in the case of *The Lady Gwendolen* the court found as a fact that although the owners had appointed a competent manager to supervise the conduct of the master, they

had failed to ensure that the person to whom the task had been delegated adequately supervised the master. In *The Sunshine Crane*, it was a case where the owners failed to secure a decree of limitation because they failed to lead any evidence about the system of maintenance followed by them. This is evident from the following passage in the judgment of Justice J Prakash:

> The officers were qualified to handle dangerous cargo like nitric acid. This fact did not, however, in my view, absolve the Appellant from its own duty to ensure that there was a proper system on board the vessel for dealing with such cargo, in particular in relation to the transfer of the cargo between vessels or between the vessel and a shore installation. No evidence was given of the existence of this system.

[44] In our judgment, the facts of this case as set out earlier in this judgment are clearly far removed from those in *The Marion*, *The Norman*, *The Lady Gwendolen* and *The Sunshine Crane*. In our judgment, if the learned trial judge had judged the appellant owners by applying the burden pronounced by Sellers LJ in *The Lady Gwendolen*, of 'the standard of conduct of the ordinary reasonable shipowner in the management and control of the vessel' then we are convinced that Her Ladyship would have reached a conclusion favourable to the appellant shipowner. In our judgment, Her Ladyship's misapprehension of the nature and extent of the burden which the owners had to discharge in itself justifies appellate intervention on the facts of this case based on the principles of law pronounced by the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309. Accordingly, we grant the appellant owner a decree limiting their liability according to the formula stipulated in s. 360 of the Merchant Shipping Ordinance.

[45] For the reasons contained in this judgment, the appeal by the owners in the collision action is allowed in part. The order of the learned trial judge is substituted with the new order whereby we hold the owners liable in negligence but grant the decree sought by the owners pursuant to s. 360 of the Merchant Shipping Ordinance 1952. Accordingly, we order the appellant owner to pay Sarawak Shell the sum of RM70,668.38 together with interest at the rate of 4% per annum from the date of filing of the writ to the date of realization. Since the appeal is allowed

in part, we order the respondents to pay half costs only to the appellant. The costs payable to be fixed at RM15,000. Deposit to be refunded to appellant.

[46] We do not propose to deal with the appellant's complaint about the errors purportedly committed by the learned trial judge on the computation of the damages awarded to the respondent in the light of our decision to grant the appellant the decree limiting their liability.

Sarawak Shell Bhd & Anor v. South Sumatra Richfield & Ors; Civil Appeal No: W-02-2795-2010.

[47] In the hire action, the learned trial judge granted judgment in favour of the appellant against Sarawak Shell Berhad for the balance of the hire due to it in the sum of USD 186,990.26 or the equivalent sum in Ringgit Malaysia together with interest at the rate of 8% per annum from 2002 until payment. Her Ladyship rejected the remaining prayers in the statement of claim of the appellant owner for damages for wrongful interference of the contract between Sarawak Shell Petroleum Company Limited and Petrokapal Sdn Bhd. Before us counsel for the appellant and respondent did not pursue this appeal with the same degree of vigour exhibited in their arguments in the 'collision action'. Be that as it may, after a careful examination of the reasons advanced by the learned trial judge in allowing the claim of the owners for the hire charges but dismissing their remaining claims, we are unanimous in our view that the learned trial judge was right in law in the manner in which she dealt with the claims of the owner in the hire action. Accordingly, we dismiss the appeal of Sarawak Shell in the hire action with costs.